Weh Han Sdn Bhd & Ors v Chua Ah Bah & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3-24-963-1994
ABDUL AZIZ MOHAMAD J
19 MAY 1995

Land Law *— Sale and purchase of land — Agreement subject to contract — Termination — Condition in agreement allowing vendors to refund deposit paid by purchasers thereby terminating agreement — Effect of condition — Whether parties bound by agreement — Removal of caveats*

The plaintiff vendors and the defendant purchasers entered into an initial agreement for the sale and purchase of 13 lots of land. The initial agreement was made subject to contract and it contained a condition, 6(a), whereby the vendors may refund the deposit paid by the purchasers together with a further amount equivalent to the deposit as liquidated damages, upon which event the agreement shall terminate.

Before the formal sale and purchase agreement was signed, the plaintiff vendors relied on term 6(b) in a termination letter to terminate the contract, stating they were uncomfortable with the requirement of vacant possession. They applied to remove caveats entered by the defendant purchasers. The defendant relied, inter alia, on s 19 of the Specific Relief Act 1950.

Held, allowing the plaintiffs' application:

(1) The purpose and effect of condition 6 was to give the freedom to either party, as long as they had not signed the sale and purchase agreement, to call off the deal, without the exercise of that freedom amounting to any default or breach on their part or bringing upon them any penalty or obligation beyond what is stipulated.

(2) The termination letter was an exercise of that freedom by the plaintiffs. They did not have to give any reason for it. The giving of the excuse that they were uncomfortable with the requirement of vacant possession did not mean that they were purporting to act under condition 5 of the initial agreement which dealt with the subject of vacant possession. Even if the initial agreement had amounted to a binding contract for the sale and purchase of 13 lots of land, with the giving of the termination letter the defendants could no longer claim any right or interest on which the caveats could be based.

(3) If condition 6 was properly construed, it would mean that the parties could not be said to have intended to be bound to sell and purchase 13 lots of land as they had in effect agreed that either party could, before signing the sale and purchase

agreement, call off the deal. The use of the phrase 'subject to contract' at the beginning of the initial agreement also indicated that the parties did not intend to be bound to sell and purchase 13 lots of land.

(4) Section 19 of the Specific Relief Act 1950 was not applicable to the initial agreement because it was not intended by the initial agreement that the failure to sign the sale and purchase agreement should constitute a breach.

[Bahasa Malaysia summary

Plaintif yang merupakan penjual dan defendan yang merupakan pembeli telah mencapai satu perjanjian awal untuk jualan dan belian 13 bidang tanah. Perjanjian awal itu adalah tertakluk kepada kontrak dan ia mengandungi satu syarat, 6(a), di mana penjual boleh membayar balik wang cengkeram yang dibayar oleh pembeli bersama dengan satu jumlah tambahan bersamaan dengan cengkeram itu sabagai ganti rugi jumlah tertentu, dan selepas itu perjanjian itu akan tamat.

Sebelum perjanjian jualan dan belian formal ditandatangani, plaintif telah bergantung pada syarat 6(b) di dalam satu surat penamatan untuk menamatkan kontrak itu, ini disebabkan plaintif tidak bersenang hati dengan keperluan milikan kosong. Mereka seterusnya memohon untuk mengetepikan kaveat-kaveat yang telah dimasukkan oleh defendan. Defendan bergantung, antara lainnya, pada s 19 Akta Relief Spesifik 1950.

Diputuskan, membenarkan permohonan plaintif:

(1) Tujuan dan kesan syarat 6 adalah untuk memberikan kebebasan kepada mana-mana pihak, selagi mereka belum menandatangani perjanjian jualan dan belian, untuk menamatkan urusniaga itu, tanpa penggunaan kebebasan itu mengakibatkan apa-apa keingkaran pada belah mereka atau membawa ke atas mereka apa-apa penalti atau obligasi melampaui apa yang telah dinyatakan.

(2) Surat penamatan itu adalah satu penggunaan kebebasan itu oleh plaintif. Mereka tidak perlu memberikan apa-apa sebab untuknya. Pemberian sebab bahawa mereka tidak bersenang hati dengan keperluan milikan kosong tidak bermakna bahawa mereka kononnya bertindak di bawah syarat 5 perjanjian awal itu yang menyentuh perkara milikan kosong. Biarpun perjanjian awal itu berjumlah kepada satu kontrak yang terikat untuk jualan dan belian 13 bidang tanah itu, dengan pemberian surat penamatan itu defendan tidak boleh lagi menuntut apa-apa hak atau kepentingan yang atasnya kaveat-kaveat itu boleh diasaskan.

(3) Jika syarat 6 ditafsirkan dengan betul, ia bermakna bahawa pihak-pihak itu tidak boleh dikatakan telah berhasrat diikat

untuk menjual dan membeli 13 bidang tanah itu kerana mereka pada hakikatnya telah bersetuju bahawa mana-mana pihak boleh, sebelum penandatanganan perjanjian jualan dan belian itu, menamatkan urusniaga itu. Penggunaan ungkapan 'tertakluk kepada kontrak' di permulaan perjanjian awal itu juga menunjukkan bahawa pihak-pihak itu tidak bertujuan diikat untuk menjual dan memebeli 13 bidang tanah itu.

(4) Seksyen 19 Akta Relief Spesifik 1950 tidak terpakai kepada perjanjian awal itu kerana bukanlah menjadi tujuan perjanjian awal itu bahawa kegagalan menanatangani perjanjian jualan dan belian itu akan mengakibatkan satu keingkaran.]

Notes

For cases on agreement subject to contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue), para 2064 and 8 *Mallal's Digest* (4th Ed) para 1997.

Legislation referred to

Specific Relief Act 1950 s 19

Tj Su and *Alice Kweh* (*Cheah Teh & Su*) for the plaintiffs.

Edward Kam and *CW Lee* (*Syarikat Kam Woon Wah*) for the defendants.

Abdul Aziz Mohamad J: This is an application by the plaintiffs for the removal of private caveats entered at the instance of the first defendant, the managing director of the second defendants, on behalf of the second defendants on 13 lots of land. The facts of the matter, as far as they are relevant to the issues that arise in this application, are as follows.

On 27 September 1994 the solicitors for the plaintiffs wrote to the solicitors for the second defendants a letter which I am going to quote in full. This is what it says:

> Dear Sirs,
>
> Re: Sale of 13 lots of freehold land in section 67, Kuala Lumpur ('the property')
>
> We act for the vendors described in Part A of the Schedule hereto.
>
> The vendors would be prepared to accept an offer from the purchaser for purchase of the property subject to contract and upon the following principal terms and conditions:
>
> 1 The property — the 13 lots of land described in Part B of the Schedule hereto free of encumbrances and with vacant possession but otherwise subject to all conditions of title express or implied and further subject to all planning and other conditions by the authorities for which the vendors make no representation or warranty.

2 Purchase price — Ringgit Malaysia Thirty Million (RM30,000,000) only.

3 Earnest money — You have till 4pm 28 September 1994 to accept the terms and conditions herein and deposit with us 0.3% of the purchase price as part earnest deposit. The balance 0.7% to be paid by 4pm of 12 October 1994.

4 Sale and purchase agreement — must be signed by 2 November 1994 and a further 9% purchase price paid on signing. The balance purchase price to be paid within three (3) months of FIC and other necessary approvals which the purchaser undertakes to obtain within six (6) months from date of the execution of the sale and purchase agreement or such extension as the parties may agree to ('the due date'), or on the vendor's delivery of vacant possession of the property to the purchaser whichever is the later. Purchaser to be given power of attorney to apply for planning and other necessary approval pending completion of the sale and purchase.

5 Vacant possession — by the due date failing which vendor entitled to an extension of three (3) months subject to the vendors compensating the purchaser interest on the 10% deposit at the rate of 10% pa on a daily basis to delivery of vacant possession failing which purchaser is entitled to terminate sale and purchase agreement or to insist on the vendors delivering vacant possession in which latter event, the vendors shall compensate the purchaser interest as aforesaid until vacant possession or in the event the purchaser elects to terminate, the vendor shall refund the deposit including all interest due in accordance with the provisions herein.

6 Contract

(a) If purchaser is in breach of the terms herein for payment of the earnest moneys or fails to execute the sale and purchase agreement in accordance with the terms herein the earnest moneys or any part thereof shall be forfeited to the vendors and this agreement shall terminate.

(b) If the vendors fail to execute the sale and purchase agreement in accordance with the terms herein, the vendors shall have to refund the earnest deposit and compensate the purchasers an equivalent amount as liquidated damages and this agreement shall terminate.

7 Other terms — subject to contract.

8 Time — Essence.

Next day, the solicitors for the second defendants, treating the letter of the solicitors for the plaintiffs as an offer, confirmed, on behalf of the second defendants, acceptance of the offer and the terms and conditions in the letter and forwarded RM90,000, being 0.3% of the earnest deposit. The solicitors for the plaintiffs, later on the same day, endorsed on the confirmatory letter of the solicitors for the second defendants that they 'confirm acceptance of the abovesaid terms and receipt of the abovesaid payment'.

So whether one views the letter of the plaintiffs' solicitors as an offer or that of the defendants' solicitors as an offer, there was finally an

offer and acceptance between the respective parties through their solicitors. That does not appear to be in dispute.

The position on 28 September 1994 was that the parties, from positions of equal strength and acting on the competent legal advice of, and through, their respective solicitors, agreed to sell and purchase the 13 lots and agreed on the principal terms and conditions of the sale and purchase as set in the letter of the plaintiffs' solicitors dated 27 September 1994. The agreed principal terms and conditions were clear, including the identity of the parties, the identity of the subject properties, the price and the conditions as to payment. I shall refer to the said letter as 'the initial agreement'.

On 12 October 1994 the second defendants paid another RM210,000, being another 0.7% of the earnest deposit. So on that date they had discharged all their obligations under the initial agreement. They had only to sign the sale and purchase agreement and pay another 9.0% of the purchase price but that was not due until 2 November 1994.

Originally the plaintiff's solicitors had agreed to draft the sale and purchase agreement but later had requested the second defendants' solicitors to do it. So on 18 October 1994 the second defendants' solicitors forwarded to the plaintiffs' solicitors for their attention a draft of the sale and purchase agreement prepared by the second defendants' solicitors, with a request to 'revert to us early on the draft'.

It was up to the plaintiffs' solicitors to revert to the second defendants' solicitors if they did not agree with any provision in the draft, but they did not.

Instead, on 26 October 1994 they wrote to the second defendants' solicitors to say:

> Our clients have never been comfortable with the condition requiring delivery of vacant possession and they have now instructed us to inform you that they are hereby exercising their rights under para 6(b) of our letter to you dated 27 September 1994 not to proceed with the sale and purchase agreement and to refund your clients the deposit plus compensate them an equivalent sum as liquidated damages.

And they forwarded a cheque for RM600,000, RM300,000 being the refund of the deposit and another RM300,000 being liquidated damages.

I shall refer to that letter as 'the termination letter'.

There are only two questions that arise in this application, namely, first, the status and effect of the initial agreement and, second, the effect of the termination letter.

The basic position taken by Encik Su for the plaintiffs is, first, that by the use of the expression 'subject to contract' in the initial agreement, the parties indicated that they did not, by the initial agreement, intend to enter into a binding contract for the sale and purchase of the 13 lots until they had signed a sale and purchase agreement and, second, that

by the termination letter the plaintiffs had terminated the initial agreement, as they were entitled to do. A

As regards the status and effect of the initial agreement, the basic position taken by Encik Kam for the defendants is that, notwithstanding the use of the expression 'subject to contract', the terms of the initial agreement were such as to show that the real intention of the parties B was that the initial agreement was to constitute a binding contract for the sale and purchase of the 13 lots albeit that it was to be followed by a formal, comprehensive sale and purchase agreement.

As to the termination letter, Encik Kam's basic stand is that the reason for which the plaintiffs sought to terminate the initial agreement C was some difficulty about delivering vacant possession, but that the plaintiffs had no right under condition 6(b) of the initial agreement to terminate it for that reason and that in any case the question of termination of agreement because of any problem about delivery of vacant possession is a question under condition 5 which, however, did not give the second defendants any right to terminate for that reason. D

I find it expedient for disposing of this application to deal first with the question of the effect of the termination letter, which is a question that is dependent on the purpose and effect of condition 6(b) of the initial agreement.

Condition 6(b) provides for the consequences of an event. The E event happens when the plaintiffs 'fail to execute the sale and purchase agreement in accordance with the terms herein'. The phrase 'in accordance with the terms herein' qualifies the phrase 'to execute'. The phrase 'the terms herein' means the terms in the initial agreement. There is only one term in the initial agreement that can be said to be a F term in accordance with which the sale and purchase agreement was to be executed, and that is the term at the beginning of condition 4 which says that it must be signed by 2 November 1994. To fail to execute the sale and purchase agreement means simply to not to execute it. So the event is the mere non-execution by the plaintiffs of the sale and purchase agreement by — which means at the latest on — 2 November 1994. G The non-execution did not have to have any reason, excuse or motive for it.

There are two consequences of that event. The first consequence is that the plaintiffs would have to refund the earnest deposit and pay the second defendants an equivalent amount as liquidated damages. H The second consequence is — and this is important — that 'this agreement' — that is the initial agreement — 'shall terminate'. When the initial agreement terminates after the required payment, the plaintiffs would cease to have any obligations thereunder to the second defendants.

The effect of condition 6(b) is therefore to enable the plaintiffs to terminate the initial agreement by not signing the sale and purchase I agreement by 2 November 1994, but they must refund the earnest deposit and pay the liquidated damages. In the final analysis, it enabled the plaintiffs to decide to call off the deal for whatever reason and at

any time so long as they had not finally bound themselves by signing the sale and purchase agreement, provided they refunded the earnest deposit and paid the stipulated liquidated damages.

The corresponding event and consequences are provided as well in condition 6(a) as regards the second defendants. They too could choose not to sign the sale and purchase agreement, with the result that they would suffer forfeiture of whatever earnest deposit they might have paid and the initial agreement would terminate. So provided they were prepared to suffer forfeiture of their earnest deposit, they too could back out for any reason and at any time before they had signed the sale and purchase agreement.

In my judgment the purpose and effect of paras (a) and (b) of condition 6 was to give the freedom to either party, as long as they had not signed the sale and purchase agreement, to call off the deal, without the exercise of that freedom amounting to any default or breach on their part or bringing upon them any penalty or obligation beyond what is stipulated in those paragraphs.

The termination letter was an exercise of that freedom by the plaintiffs. They did not have to give any reason for it although they might have felt it would not be decent not to give some kind of excuse for it, and so they gave the excuse of not being comfortable with the condition requiring vacant possession. The giving of that excuse did not mean they were purporting to act under condition 5. It is clear they were acting by virtue of condition 6(b). Since they need not have given any reason or excuse, the sufficiency, truthfulness or appropriateness of the reason or excuse given is not relevant or material. It matters not that the truth was that the plaintiffs had entered into agreement with someone else to sell the 13 lots at a higher price, as suggested by Encik Kam.

In my judgment the termination letter had effectively terminated the initial agreement so that, even if the initial agreement had amounted to a binding contract for the sale and purchase of the 13 lots, with the giving of the termination letter the defendants can now no longer claim any right or interest on which to base the caveats. The caveats must therefore be removed.

That is sufficient to dispose of this application, but I think I ought nevertheless to make a finding on the status and effect of the initial agreement, and I think the question is whether, by the initial agreement, the parties intended presently to be bound to each other to sell and purchase the 13 lots or whether they did not so intend until they had signed the sale and purchase agreement. I think the answer to that question depends on the answer to the question as to the purpose and effect of condition 6 of the initial agreement. If I am right in my opinion on the latter question, then the answer to the present question must be that, by the initial agreement, the parties did not intend to be presently bound to sell and purchase the 13 lots but they intended to be so bound only when they had signed the sale and purchase agreement. They

cannot be said to have intended to be presently bound when, by condition 6, they had in effect agreed that either party could, before signing the sale and purchase agreement, call off the deal.

I am fortified in that opinion, which is based on a consideration of the purpose and effect of condition 6, by the use of the expression 'subject to contract' at the beginning of the initial agreement. There is another place where that expression is used, and that is in condition 7, for 'Other Terms'. There the expression simply means that terms other than those set out in the initial agreement would be provided for in the sale and purchase agreement to be signed as provided in condition 4. If the parties had intended that they were to be contractually bound by the initial agreement and that the sale and purchase agreement was merely to be the ultimate document to regulate the rights and obligations between them in continuation or in the stead of the initial agreement, it was sufficient for them to have relied solely on the mention of the sale and purchase agreement in conditions 4 and 5 and on the use of the expression 'subject to contract' for condition 7. There would have been no need for the expression 'subject to contract' at the beginning of the initial agreement. I think there, unlike in condition 7, the expression was intended as a formula deliberately employed to preclude the present assumption by the parties of contractual obligations.

In my opinion, therefore, the initial agreement was not a binding contract for the sale and purchase of the 13 lots and could not provide a basis for the entry of the caveats. For that reason, too, the caveats should be removed. That does not mean, however, that the initial agreement was not binding at all between the parties. It was binding and enforceable as far as it could go. My decision on the two issues in this application is, after all, in the main, based on the binding effect of condition 6, which bound the parties to the consequences of what they had agreed to say there.

There are two other matters that arose in the course of submissions that I ought to dispose of.

In his attempt to deny the purpose and effect of condition 6 as I have found it to be, Encik Kam resorted to s 19 of the Specific Relief Act 1950, which provides as follows:

> A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

It is clear to me from the wording of the section itself that it is intended to apply in the event of a breach of a contract that is proper to be specifically enforced. Even though such a contract fixes the amount to be paid in case of its breach and the party in default is willing to pay it, he may still be compelled to carry out the contract. Section 19 is not applicable to the initial agreement because, if I am right in my construction of the purpose and effect of condition 6, it was not intended by it that the failure to sign the sale and purchase agreement should constitute a breach. It was a mutually agreed-to failure that would bring

about a termination of the agreement, which of necessity had the effect of giving a right not to go ahead with the sale or purchase. The refund and payment that the plaintiffs had to make in this case was not a payment in case of breach that is intended by s 19.

The other matter relates to the time within which the balance of the purchase price was to be paid. Under condition 4 of the initial agreement, the maximum period was nine months from the date of execution of the sale and purchase agreement. Encik Su submitted that the effect of cll 2.01(a), 2.02(b) and 2.03(a) of the draft sale and purchase agreement prepared by the solicitors for the second defendants was to lengthen the maximum period to 18 months. Because of that difference, Encik Su submitted that the draft sale and purchase agreement did not incorporate the terms of the initial agreement and that, at best, the sale and purchase agreement became a counter-offer. Therefore, he argued, the parties were still negotiating the terms and there could not have been a binding contract between them.

I have not taken that difference into account in arriving at my conclusion that there was no binding contract between the parties for the sale and purchase of the 13 lots because I do not think that it is an indication that the parties were still negotiating. Condition 4 of the initial agreement contains the phrase 'or such extension as the parties may agree', which means that the parties have agreed in the initial agreement that the period stipulated in condition 4 could be lengthened if the second defendants wished and the plaintiffs agreed. In my view the extension of the period in the draft sale and purchase agreement was merely a proposal or request by the second defendants made pursuant to what had been agreed in condition 4 of the initial agreement. It was not a counter-offer. It was up to the plaintiffs to agree or not to agree. If the plaintiffs did not agree, the second defendants would probably have agreed to adhere strictly to the periods stipulated in condition 4 along with the qualification 'or such extension as the parties may agree'. Had the plaintiffs not changed their minds about proceeding with the deal, that difference would probably not have posed any real problem in the way of the signing of the sale and purchase agreement.

For the reasons that I have given, I order that the caveats in question be removed and that the defendants to pay the plaintiffs any compensation, to be assessed by the senior assistant registrar, that the defendants are liable to pay to the plaintiffs under s 329(1) of the National Land Code 1965 on account of the entry of those caveats and the costs of this application and of the assessment of compensation.

Order accordingly.

Reported by Herman LH Poon